

1 Andrew C. Schwartz (State Bar No. 64578)  
2 Larry E. Cook (State Bar No. 122776)  
3 Thom Seaton (State Bar No. 62317)  
4 **CASPER, MEADOWS, SCHWARTZ & COOK**  
5 A Professional Corporation  
6 California Plaza  
7 2121 North California Blvd., Suite 1020  
8 Walnut Creek, California 94596  
9 Telephone: (925) 947-1147  
10 Facsimile: (925) 947-1131

11 Attorneys for Plaintiff  
12 SHAWN DAY

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA

15 SHAWN DAY, individually and as  
16 successor in interest to the Estate of  
17 Steffen Matthew Day,

18 Plaintiff,

19 vs.

20 COUNTY OF CONTRA COSTA, JOSHUA  
21 PATZER, WARREN RUPF, and Does 1  
22 through 50, et al.,

23 Defendants.

**Case No. C07-4335-PJH**

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' OBJECTIONS TO  
EVIDENCE**

Date: September 10, 2008  
Time: 9:00 a.m.  
Judge: Honorable Phyllis J. Hamilton  
Dept: Courtroom 3, 17<sup>th</sup> Floor (SF)

24 Defendants' Objections To Evidence seek to convince the Court to eschew the  
25 teaching of *Scott v. Henrich* 39 F.3d 912, 915 (9<sup>th</sup> Cir. 1990) to tread softly before  
26 accepting the self-serving testimony of the sole surviving eyewitness in a deadly force  
27 case on a motion for summary judgment. Defendants make a plethora of arguments  
28 to convince the Court that it should exclude all evidence that conflicts with Deputy  
Patzner's version of events.

Defendants argue that they have been "sandbagged" by Plaintiff's citation to  
facts beyond those listed in answers to interrogatories. The County's indignation is  
somewhat ingenuous, to say the least. The records of its investigation into the  
shooting, which it produced to Plaintiff, establish that the County has known from the

1 outset that a substantial contradiction existed between what Deputy Patzer stated to  
2 Sergeant Gary Clark minutes after the shooting and the version he provided after  
3 meeting with counsel. Given Defendants' knowledge that Deputy Patzer had altered  
4 his version of events, Defendants' chagrin is misplaced.

5 Defendants' audacity also is expressed in their claim that the investigatory  
6 documents they produced from their own files are not authentic, a claim they make  
7 without attacking the inaccuracy of any of these exhibits. Hoping to preclude  
8 consideration of all evidence which disputes Deputy Patzer's narrative, Defendants  
9 assert that the testimony of Sonja and Henry Martin is too speculative to be admitted –  
10 although that testimony corroborates what Deputy Patzer told Sergeant Clark. At the  
11 same time, they ask the Court to rely solely on the recollection of Deputy Patzer who  
12 repeatedly noted that his surroundings were "pitch black" and so dark that he couldn't  
13 see his hand.

14 Defendants' challenge to the testimony of Defendants' expert, Roger Clark,  
15 also falls short. The Ninth Circuit has recognized the importance of police procedure  
16 experts (*Smith v. City of Hemet*, 394 F.3d 689 (9<sup>th</sup> Cir. 2005)) particularly in cases in  
17 which the police officer is the only eyewitness. *Scott v. Henrich*, *supra*, 39 F.3d at  
18 915. Clark has been qualified in many cases and cited in several decisions, including  
19 *Blankenhorn v. City of Orange*, 485 F.3d 463, 485 (9<sup>th</sup> Cir. 2007). Defendants'  
20 objections go to the weight, not admissibility of his testimony.

21 Rather than follow Defendants' lead, the Court should hearken to Ninth Circuit  
22 precedent which repeatedly has instructed district courts that summary judgment  
23 should only be "granted sparingly" in excessive force cases "[b]ecause [the excessive  
24 force inquiry] nearly always requires a jury to sift through disputed factual contentions,  
25 and to draw inferences therefrom." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9<sup>th</sup> Cir.  
26 2005).

27 ///

28 ///

## 1 I. PRINCIPLES RE AUTHENTICATION

2 "[The burden of proof for authentication is slight." *Lexington Ins. Co. v.*  
 3 *Western Pennsylvania Hosp.*, 423 F.3d 318, 328 (3<sup>rd</sup> Cir. 2005), quoting *McQueeney*  
 4 *v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985). See, Jones & Rosen,  
 5 *Federal Civil Trials And Evidence*, The Rutter Group (2008) ¶ 8:429 at 8C-34. (Burden  
 6 on the party seeking to authenticate a document is "slight.")

7 *Ricketts v. City of Hartford*, 74 F.3d 1397, 1411 (2<sup>nd</sup> Cir. 1996), on which  
 8 Defendants rely, teaches that the court's discretion "is limited to a determination  
 9 whether 'sufficient proof has been introduced so that a reasonable juror could find in  
 10 favor of authenticity or identification,'" quoting *United States v. Ruggiero*, 928 F.2d  
 11 1289, 1303 (2d Cir. 1991.)

12 The Ninth Circuit has explained that " 'The proponent need not establish a  
 13 proper foundation through personal knowledge; a proper foundation "can rest on any  
 14 manner permitted by Federal Rule of Evidence 901(b) or 902.' Rule 901 allows the  
 15 district court to admit evidence 'if sufficient proof has been introduced so that a  
 16 reasonable juror could find in favor of authenticity or identification.' " *U.S. v. Pang*, 362  
 17 F.3d 1187, 1193 (9<sup>th</sup> Cir. 2004). See, *McQueeney v. Wilmington Trust Co.*, 779 F.2d  
 18 916, 930 (3d Cir. 1985) ("Defense counsel was entitled to proffer the [records] without  
 19 any authenticating testimony or other foundation."). Hence, authentication issues,  
 20 which often involve credibility determinations, are better left to the jury. *Forbis v.*  
 21 *McGinty*, 292 F.Supp.2d 160, 163 (D. Me. 2003).

22 In *U.S. Information Systems, Inc. v. International Broth. of Elec. Workers Local*  
 23 *Union Number 3* 2006 WL 2136249, at 5-6 (S.D.N.Y. 2006), the court confirmed that  
 24 Rule 901(a) of the Federal Rules of Evidence 'does not erect a particularly high  
 25 hurdle.' *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). It is satisfied 'if  
 26 sufficient proof has been introduced so that a reasonable juror could find in favor of  
 27 authenticity or identification.' *United States v. Ruggiero*, 928 F.2d 1289, 1303 (2d  
 28 Cir.2001)."

1 In a similar vein, the First Circuit has explained, "[T]he burden of authentication  
 2 does not require the proponent of the evidence to rule out all possibilities inconsistent  
 3 with authenticity, or to prove beyond any doubt that the evidence is what it purports to  
 4 be. Rather, the standard for authentication, and hence for admissibility, is one of  
 5 reasonable likelihood." *U.S. v. Pluta* 176 F.3d 43, 49-50 (2<sup>nd</sup> Cir. 1999), quoting  
 6 *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994).

7 In *AMCO Ins. Co. v. Madera Quality Nut LLC* 2006 WL 2091944 (E.D.Cal.  
 8 2006), Magistrate Judge Snyder summarized the showing a proponent must make to  
 9 authenticate a document:

10 Authentication requirements are satisfied by evidence  
 11 sufficient to support a finding that the matter in question is what its  
 12 proponent claims, Fed.R.Evid. 901(a). It is sufficient if there is  
 13 enough support in the record to warrant a reasonable person in  
 14 determining that the evidence is what it purports to be; thereafter, the  
 15 question of weight to be given to the evidence is left to the finder of  
 16 fact. *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir.1994)  
 17 (finding that a photocopy of a check was authentic in light of the  
 18 totality of the circumstances, including the date, payee, amount, and  
 19 corroboration provided by its alleged receipt in a package that  
 20 included an invoice mentioning a credit in the amount of the check).  
 21 The burden of authentication does not require the proponent of the  
 22 evidence to rule out all possibilities inconsistent with authenticity, or  
 23 to prove beyond any doubt that the evidence is what is purports to  
 24 be; rather, the standard is reasonable likelihood. Circumstantial  
 25 evidence is sufficient to authenticate evidence. It is also possible to  
 26 authenticate evidence by the act of production in response to a  
 27 subpoena. *Unites States v. Lawrence*, 934 F.2d 868, 871 (7th  
 28 Cir.1991) (corporate officer's voluntary production in response to  
 subpoena held to be sufficient to authenticate the documents).

2006 WL 2091944, at 6-7 (some citations omitted).

1 As Plaintiffs will show, far more than a reasonable likelihood exists that the  
2 documents Plaintiffs have cited are what they purport to be.

3 **I. DEFENDANTS' CHALLENGE TO THE AUTHENTICITY OF PLAINTIFFS'**  
4 **EXHIBITS FAILS.**

5 **A. Documents Produced By Defendants During Discovery.**

6 Defendants challenge the authenticity of the Criminalistics portion of the Police  
7 Report (Ex. 5 to Declaration of Thom Seaton); the Transcript of the Gary Clark  
8 interview (Ex. 6 to the Declaration of Thom Seaton); and an excerpt from the Pittsburg  
9 Police Department Report (Ex. 7 to the Declaration of Thom Seaton).

10 Defendants' authentication objection fails, for, as here, "Once a defendant  
11 voluntarily produces documents and implicitly represents them to be the subpoenaed  
12 corporate records, he cannot be heard to contend that they are not so." *U.S. v.*  
13 *Lawrence* 934 F.2d 868, 871 (7<sup>th</sup> Cir. 1991). *Lawrence* explains that and defendant's  
14 "very act of production was implicit authentication." *Id.*

15 Here, therefore, Plaintiffs "argument that the process of discovery provides an  
16 implicit guarantee of authenticity is well-founded. . . . It is disingenuous for the  
17 producing party to dispute the document's authentication without proffering some  
18 basis for questioning it." *U.S. Information Systems, Inc. v. International Broth. of Elec.*  
19 *Workers Local Union Number 3*, 2006 WL 2136249, at 6 (S.D.N.Y. 2006). The Gary  
20 Clark transcript; the Criminalistics report and the page from the Pittsburg Police  
21 Report were produced by Defendants during discovery. May Defendants now argue  
22 that the documents which they produced, are not what they purport to be? Tellingly  
23 Defendants have not challenged the *accuracy* of the documents. Indeed, "A party  
24 producing a document is in a better position to know whether the document is  
25 authentic than the party seeking it in discovery." *Id.*

26 Many courts have recognized that by producing documents during discovery,  
27 the producing party essentially vouches for the authenticity of those documents which  
28 it has prepared. See, e.g., *McQueeney v. Wilmington Trust Co.*, *supra*, 779 F.2d at

929 (Documents authenticated when produced by the party against whom they were offered, even though testimonial evidence did not provide necessary foundation for authentication); *Sprinkle v. Lowe's Home Centers, Inc.*, 2006 WL 2038580, at 2 (S.D. Ill. 2006) ("When a party has produced the document in question in response to a subpoena or discovery request, he has implicitly authenticated the document."); *Tracinda Corp. v. DaimlerChrysler AG*, 362 F.Supp.2d 487, 500 (D. Del. 2005) ("With respect to PX 26, the Court is persuaded that authentication has been established by the fact that Defendants produced the document."); *Miller v. Whipker*, 2004 WL 1622212, at 6 (S.D. Ind. 2004) ("[I]t is apparent that the documents were produced by Defendants in response to Plaintiff's discovery request for domestic violence training materials. The act of producing documents has been held to authenticate documents implicitly."); *Wechsler v. Hunt Health Systems, Ltd.*, 2003 WL 21998985, at 2, n.4 (S.D.N.Y. 2003) ("If the documents included in [the exhibits] are indeed copies of documents produced by defendants in discovery, then the authentication of these documents will be easily established."); *John Paul Mitchell Systems v. Quality King Distributors, Inc.*, 106 F.Supp.2d 462, 472 (S.D.N.Y. 2000) ("[T]he act of production implicitly authenticated the documents. 'Just as [the defendant] could have identified the records by oral testimony, his very act of production was implicit authentication.'"); *Billis v. Chicago Transit Authority*, 1994 WL 23126, at 3 (N.D. Ill.1994) (Production of minutes during discovery implicitly authenticated that document) and defendants could not be heard to say otherwise); See, Jones & Rosen, *Federal Civil Trials And Evidence*, The Rutter Group (2008) ¶ 8:454 at 8C-38 ("Sometimes the very act of production implicitly establishes a document's authenticity.").

The Court therefore must reject Defendants' claim that the Gary Clark transcript; the Criminalistics report and the excerpt from the Pittsburg Police Department report are not authenticated. Defendants do not claim that these documents are not what they purport to be. Indeed, the police report prepared by Detective Deplitch confirms the accuracy of the transcript of the Clark interview.

Produced by Defendants, these documents more than meet the low threshold which a party must surmount to authenticate a document. More than a reasonable likelihood exists that these documents are what Plaintiff claims they are.

Plaintiff understand that Defendants have raise other objections to these documents. Plaintiff will address these objections after refuting other Defendants' authentication objections to other documents.

### **B. The Patzer Interview**

Without pointing to a single error in the certified transcription of the Patzer interview, Defendants nonetheless asserts that the transcripts are not what they appear to be – an accurate transcription of the statements Deputy Patzer made to investigators following the shooting.

To further establish the accuracy of the transcription, Plaintiff has compared the transcript prepared by Zandonella Court Reporting with the transcript which Defendants produced during the discovery. The relevant pages are attached as Exhibit 1 to the Declaration of Thom Seaton filed herewith. Plaintiff lists below the page and line references and cited testimony from the Zandonella prepared transcript together with the location in transcript which Defendants prepared and produced during discovery:

<u>Testimony</u>	<u>Zandonella Transcript</u>	<u>Defendants' Transcript</u>
Patzer at mother's house		
between shifts	10:12-14	P. 4, at Bates 624: 171-172
Pitch black; can't see hand	18:8	P. 9, 629:372
Didn't see what hit him	18:18-19	P. 9, 629:682-684.
Couldn't see anything	18:23-24	P. 9, 629:392
Grabbed shirt	19:15	P. 10, 630:409

1	Swung punches, pushed Patzer		
2	Into debris	19:22-23	P. 10, 630:414-416
3			
4	Lost footing in rubble and		
5	plastic stuff	21:3-4	P. 11, 631:454
6	Patzer slipped; his arm went		
7	into rubble pile of rubble	21:7-9	P. 11, 631:456-457
8			
9	Patzer pushed him (Day) away	21:10-13	P. 11, 631:458-459
10			
11	Patzer put his hand on his pistol	21:14-15	P. 11, 631:461
12	Patzer felt something from		
13	behind	21:15-16	P. 11, 631:461-462
14			
15	Patzer fired one pistol round	21:16-18	P. 11, 631:463
16			
17	Couldn't see anything	24:2	P. 12, 632:521
18			
19	Feet never had firm setting	24:2-3	P. 12, 632:521-522
20	After shooting Patzer moved	24:4-10	P. 12, 632:522-527
21	piles and garbage bags		
22			
23	Patzer crouching when		
24	he fired shot	24:18	P. 13, 633:537
25	Patzer fired one shot	24:22-23	P. 13, 633:540
26			
27	Day moving southbound		
28	(prior to shooting)	27:22-28:2	P. 14, 634:613-615

1 Day hit "glancing blows" 31:22 P. 16, 636:714

2  
3 To avoid punches, Patzer  
4 would "duck and move." 31:20-24 P. 16, 636:714

5 The court reporter-prepared transcript of the Patzer interview more than meets  
6 the low threshold which a party must surmount to authenticate a document. More  
7 than a reasonable likelihood exists that a reasonable jury would find that the Patzer  
8 interview transcript is what Plaintiff claims it to be – an accurate transcript of Deputy  
9 Patzer's interview.

10 **C. The Archie Gore Declaration And Diagram.**

11 Defendants do not contest the accuracy of Mr. Gore's "detailed diagram." The  
12 diagram is dated August 17, 2006. The diagram is fully consistent with the  
13 Criminalistics report prepared by the Sheriff's Office and produced by Defendants.  
14 That report includes a diagram (Bates stamp 773) which places the air conditioning  
15 unit south of blood spots and north of the gate. The Gore diagram is also consistent  
16 with the photographs of the yard and the video submitted by Defendants to support  
17 their motion.

18 The Gore diagram made on August 17, 2006, more than meets the low  
19 threshold which a party must surmount to authenticate a document. More than a  
20 reasonable likelihood exists that a reasonable jury would find that the Gore diagram is  
21 what Plaintiff claims it to be – an accurate depiction of the rear yard of 26 Galleon  
22 Way, Pittsburg, California.

23 **II. THE GOVERNMENT DOCUMENTS PRODUCED DURING DISCOVERY**  
24 **ALSO ARE ADMISSIBLE AS GOVERNMENT RECORDS UNDER**  
**FEDERAL RULE OF EVIDENCE 803(8).**

25 Federal rule of Evidence 803(8) excepts from the hearsay rule "Records,  
26 reports, statements, or data compilations, in any form, of public offices or agencies,  
27 setting forth (A) the activities of the office or agency." The Gary Clark interview, the  
28 Criminalistics report and the excerpt from the Pittsburg Police Department

1 investigation are government records admissible under Rue 803(8).

2 Moreover, Federal Rule of Evidence 803(8)(C) explicitly excepts public records  
3 and reports "resulting from an investigation made pursuant to authority granted by  
4 law," from exclusion under the hearsay rule. See, *Clark v. Clabaugh*, 20 F.3d 1290,  
5 1294 (3<sup>rd</sup> Cir. 1994) (Admitting investigatory report).

6 **III. DEPUTY PATZER'S ADMISSIONS IN THE GARY CLARK DEPOSITION**  
7 **ARE ADMISSIBLE.**

8 Federal Rule of Evidence 801(d)(2)(a) states that a "party's own statement"  
9 offered against a party is not hearsay. The transcript of the Sergeant Gary Clark  
10 interview contains statements by Deputy Patzer which are admissible as admissions.  
11 Deputy Patzer has maintained that he sustained the knot on his forehead from a blow  
12 delivered by Steffen Day. In response to a question about whether Deputy Patzer had  
13 hit his head on the air conditioner, Sergeant Clark told his interviewers, "Yes he said  
14 he bumped on his head – on the corner of the air conditioner, he had a nice goose  
15 egg up there." Sergeant Gary Clark Interview, Ex. 6 to Seaton Declaration, at page  
16 615:625-626. Sergeant Clark also stated that Deputy Patzer did not indicate to him  
17 that he was hurt. *Id.*, at 607:227-229.

18 The Advisory Committee's note on Rule 801(d)(2)(A) states:

19 *Admissions.* Admissions by a party-opponent are excluded from  
20 the category of hearsay on the theory that their admissibility in  
21 evidence is the result of the adversary system rather than satisfaction  
22 of the conditions of the hearsay rule. Strahorn, A Reconsideration of  
23 the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937);  
24 Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048.  
25 No guarantee of trustworthiness is required in the case of an  
26 admission. The freedom which admissions have enjoyed from  
27 technical demands of searching for an assurance of truthworthiness  
28 in some against-interest circumstance, and from the restrictive  
influences of the opinion rule and the rule requiring firsthand

1 knowledge, when taken with the apparently prevalent satisfaction with  
 2 the results, calls for generous treatment of this avenue to  
 3 admissibility.

4 Federal Rules of Evidence Rule 801, Advisory Committee Notes.

5 Deputy Patzer's statements, contained in a document produced by Defendants  
 6 who do not challenge its accuracy, are admissible admissions which this Court must  
 7 consider in deciding whether to grant summary judgment. Deputy Patzer does not  
 8 deny that he made the admission to Sergeant Clark. *See, United States v. Sanders*,  
 9 421 F.3d 1044, 1049 (9<sup>th</sup> Cir. 2004) (Statement by inmate deemed admissions after  
 10 court made preliminary finding that defendant made statements attributed to him);  
 11 *Gilbrook v. City of Westminster*, 177 F.3d 839, 859 (9<sup>th</sup> Cir. 1999) (Affirming  
 12 admissibility of "hearsay" admissions by party-opponent).

13 Deputy Patzer's admissions are highly relevant in this deadly force case. The  
 14 testimony is particularly significant given the Ninth Circuit's instruction in *Scott v.*  
 15 *Henrich* 39 F.3d 912, 915 (9<sup>th</sup> Cir. 1994) to view the officer's self-serving statements  
 16 with caution and to carefully consider other evidence, including "contemporaneous  
 17 statements by the officer." Deputy Patzer informed Sergeant Clark within minutes of  
 18 the shooting that he had struck his head on the air conditioner. He had not yet spoken  
 19 with counsel, with whom he would consult at length before his formal interview.  
 20 Following the Advisory Committee's teaching that the Court should accord "generous  
 21 treatment of this avenue to admissibility" the Court must admit this testimony.

### 22 **III. THE MARTIN DECLARATIONS**

23 Defendants express indignation at Plaintiff's reference to evidence beyond that  
 24 listed in responses to interrogatories served five months ago. Yet these facts are not  
 25 new to the County. Deputy Patzer told Sergeant Clark minutes after the shooting that  
 26 he had hit his head on the air conditioner. Moreover, as the Martin Declarations  
 27 attest, Henry and Sonja Martin contacted the police to explain their conclusions about  
 28 the noises they had heard. Sonja Martin Declaration, ¶ 7; Henry Martin Declaration, ¶

1 4. Thus since August, 2006, the County has been well aware of the evidence Plaintiff  
 2 has set forth in his papers opposing summary judgment. Notwithstanding this  
 3 knowledge, Defendants' motion omits these pertinent facts in seeking dismissal of the  
 4 action.

5 Sonja Martin has submitted a declaration attesting that she heard loud sounds  
 6 from the 26 Galleon Way yard and that the first sounds she heard "were those of the  
 7 gate breaking down and possibly someone running into the air conditioning unit."  
 8 Sonja Martin Decl., ¶ 5. Mr. Martin's declaration states that he believed that the sound  
 9 he heard was "the breaking of the gate and /or someone running into the gate and air  
 10 conditioner almost simultaneously." Henry Martin, Decl., ¶ 3.

11 Defendants assert that these declarations are inadmissible under Federal Rule  
 12 of Evidence 602 because these declarants lack the requisite personal knowledge of  
 13 the event about which they testified. Rule 602 provides, in relevant part, that "[a]  
 14 witness may not testify to a matter unless evidence is introduced sufficient to support  
 15 a finding that the witness has personal knowledge of the matter."

16 In *U.S. v. Franklin*, 415 F.3d 537, 549 (6<sup>th</sup> Cir. 2005), the court reiterated that  
 17 "The threshold for admitting testimony under Rule 602 is 'low. Testimony should not  
 18 be excluded for lack of personal knowledge unless no reasonable juror could believe  
 19 that the witness had the ability and opportunity to perceive the event that he testifies  
 20 about,'" quoting *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir.1990). *Hickey*  
 21 further explained that "Testimony should not be excluded for lack of personal  
 22 knowledge unless no reasonable juror could believe that the witness had the ability  
 23 and opportunity to perceive the event that he testifies about." 917 F.2d at 904. See,  
 24 also, *U.S. v. Doe*, 960 F.2d 221, 223(1<sup>st</sup> Cir. 1992) ("The test is 'whether a reasonable  
 25 trier of fact could believe the witness had personal knowledge.'"); *U.S. v. Cobb*, 2007  
 26 WL 4571340, at 4 (S.D. Ohio 2007) ("[I]t has also been noted that "the threshold of  
 27 Rule 602 is low" and held that "testimony should not be excluded for lack of personal  
 28 knowledge unless no reasonable juror could believe that the witness had the ability

1 and opportunity to perceive the event that he testifies about.”).

2 “Whether an introducing party has met the affirmative burden of Rule 602 is  
3 ultimately one for the *jury* pursuant to F.R.Evid. 104(b).” *U.S. v. Owens*, 699 F.Supp.  
4 815, 817 -818 (C.D. Cal.1988), citing 3 *Weinstein's Evidence* ¶ 602[02]. Quoting  
5 *Weinstein*, the *Owens* court stated, “ ‘The judge retains the power to reject the  
6 evidence if it could not reasonably be believed- *i.e.*, if as a matter of law no trier of fact  
7 could find that the witness actually perceived the matter about which he is testifying. . .  
8 “Near impossibility” or “so improbable that no reasonable person could believe” better  
9 states the judge's role-to determine whether the witness has enough to add to warrant  
10 the time and possible confusion in hearing his testimony. . . . The judge should admit  
11 the testimony if the jury *could* find that the witness perceived the event to which he is  
12 testifying, since credibility is a matter for the jury.” 699 F.Supp. at 817. See, *e.g.*,  
13 *Benhabib v. Hughes Electronics Corp.*, 2007 WL 4144940, at 5 (C.D.Cal. 2007)  
14 (“[T]estimony should not be excluded for lack of personal knowledge unless no  
15 reasonable juror could believe that the witness had the ability and opportunity to  
16 perceive the event that he testifies about.”); *Barto v. Armstrong World Industries, Inc.*,  
17 923 F.Supp. 1442, 1446-1447 (D. N.M.1996) (“Decedent's medicated state and his  
18 sometimes uncertain testimony may raise some questions regarding his credibility.  
19 However, such questions go to the weight and not the admissibility of his testimony.”);  
20 *S.E.C. v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992) (“Rule 602 does not require  
21 the witness' personal knowledge to rise to the level of certainty to be admissible.  
22 Testimony is admissible even though the witness is not positive about what he  
23 perceived, provided the witness had an opportunity to observe and obtained some  
24 impressions based on his observations,” citing *United States v. Reitano*, 862 F.2d 982,  
25 987 (2d Cir.1988.); *Briton v. Loggans* 2006 WL 2336556, at 2 (M.D. Tenn. 2006)  
26 (Certainty not required, quoting *Singer*).

27 The Martin home adjoined the yard at 26 Galleon Way. They testified, based  
28 on their own personal knowledge, that they heard what they believed was the sound of

1 someone falling through the gate and/or hitting the air conditioner. The air conditioner  
 2 was located a few feet from the gate through which Patzer testified, he and Day fell.  
 3 The Court cannot find that no reasonable jury could conclude that the Martins did not  
 4 in fact hear Deputy Patzer collide with the air conditioner after falling through the  
 5 fence. The accuracy of the Martins' perceptions is heightened by Deputy Patzer's  
 6 statement to Sergeant Gary Clark that he struck his head on the air conditioner.

7 Defendants' Rule 701 objection, that the Martins' testimony is not "rationally  
 8 based on the perception of the witness[s]" also lacks merit. As the Advisory  
 9 Committee Notes point out, "Limitation (a) is the familiar requirement of first-hand  
 10 knowledge or observation." The Martins' declaration meets that standard.

11 Indeed, no question exists that the Martins contemporaneously heard sounds  
 12 from next door the yard. After visiting the site, they concluded that what they had  
 13 heard was the sound "of the gate breaking down and possibly someone running into  
 14 the air conditioning unit." (Sonja Martin Decl., ¶ 5) or "the breaking of the gate and /or  
 15 someone running into the gate and air conditioner almost simultaneously." Henry  
 16 Martin, Decl., ¶ 3. These were rational inferences based on the hearing of sounds  
 17 prior to the shooting and an examination of the scene which disclosed a broken gate  
 18 adjacent to an air conditioner which all agree juts from the wall into the yard of 26  
 19 Galleon Way.

#### 20 IV. THE ROGER CLARK TESTIMONY

##### 21 A. Roger Clark Has Been Accepted As An Expert Witness On 22 Police Procedure

23 In *Smith v. City of Hemet*, 394 F.3d 689, 703 (9<sup>th</sup> Cir. 2005), the Ninth Circuit  
 24 recognized that testimony of a police procedure expert would assist the jury in  
 25 determining whether alternative means of subduing a suspect were available. The  
 26 court noted that *Larez v. City of Los Angeles*, 946 F.2d 630, 635 (9th Cir.1991) had  
 27 found that "that testimony of 'an expert on proper police procedures and policies' was  
 28 relevant and admissible" and that *Davis v. Mason County*, 927 F.2d 1473, 1484-85

1 (9th Cir. 1991) had concluded that "testimony of plaintiffs' police practices expert that  
2 officers violated law enforcement standards [was] properly received." Moreover, in  
3 *Scott v. Henrich* 39 F.3d 912, 915 (9<sup>th</sup> Cir. 1994), the Ninth Circuit expressly noted the  
4 importance of expert testimony in cases in which the surviving officer presents the only  
5 eyewitness testimony.

6 Roger Clark has been accepted as a police procedures expert on many  
7 occasions. In *Blankenhorn v. City of Orange*, 485 F.3d 463 (9<sup>th</sup> Cir. 2007), the Ninth  
8 Circuit relies on Clark's expert testimony in partially reversing summary judgment in an  
9 excessive force case. Addressing the issue of supervisory liability, the court stated:

10 Blankenhorn presented expert testimony from Roger Clark  
11 ("Clark"), a former sergeant and lieutenant with twenty-seven years of  
12 experience in the Los Angeles County Sheriff's Department. Clark's  
13 opinion was that the Department's discipline of Nguyen in all three  
14 matters was insufficient. Clark opined that discipline for the first  
15 complaint "should have included a re-training component and a period  
16 of monitoring to make this effective discipline and for deterrence." For  
17 the second, Clark said Nguyen should have been fired. For the last  
18 complaint, Clark said that the "imposition of a written reprimand was  
19 tantamount to no discipline."

20 485 F.3d at 485.

21 In *LeBlanc v. City of Los Angeles*, 2006 WL 4752614 (C.D. Cal. 2006), the  
22 court described Clark in these terms:

23 Gary Clark [sic]<sup>1</sup>, the fourth and last expert witness for Plaintiff,  
24 is a twenty-seven year veteran of the Los Angeles County Sheriff's  
25 Department ("LACSD"). Before retiring from active service in 1993, his  
26 career included six years at the rank of deputy sheriff, six years as a  
27 sergeant, and fifteen years as a lieutenant. He holds a California  
28

1 Peace Officer Standard Training ("POST") advanced certificate, and  
 2 is a graduate of the POST Command College. He has extensive  
 3 experience testifying as an expert on police procedure and police  
 4 tactics in both state and federal court. Clark opines that LAPD officers  
 5 did not follow standard police protocol and procedure because they  
 6 acted with unnecessary haste in using force without giving sufficient  
 7 time for the situation to de-escalate, and because they did not take  
 8 into account LeBlanc's heightened vulnerability in executing the  
 9 tactical plan.

10 2006 WL 4752614, at 6. While the court did not permit Clark to testify as to certain  
 11 medical matters, it permitted him to testify about decedent's mental state and the  
 12 police protocols for dealing with an individual in that state. He also was permitted to  
 13 testify that the numerically superior LAPD officers should have been able to subdue  
 14 plaintiff without using a taser. *Id.*, at 10. Recently, in *Smith v. City of Oakland*, 538  
 15 F.Supp.2d 1217 (N.D. Cal.2008), Magistrate Judge Chen qualified Clark to testify as  
 16 an expert on standard police procedures. Following a jury verdict in plaintiff's favor,  
 17 the court rejected defendants' challenges to his testimony and cited that testimony as  
 18 a basis for upholding the finding of liability. 538 F.Supp.2d at 1228-1229, 1230.

19 Mr. Clark has submitted, under penalty of perjury, a list of trials at which he has  
 20 been qualified as an expert and testified.

21 Mr. Clark attached his CV to his sworn declaration. Among the positions he  
 22 held with the Los Angeles Sheriff's Department was the command of a unit focused on  
 23 the investigation, location, observation and arrest of career criminals. Clark held this  
 24 position for over five years. His command responsibilities and ability of the unit to  
 25 perform its tasks without the use of deadly force for 61 months attests to his expertise  
 26 in the supervision of deputies in their use of force.

27  
 28 <sup>1</sup> The court is referring to Roger Clark, as is clear from the discussion of "Roger Clark's"  
 testimony later in the opinion. 2006 WL 4752614, at 10.

1 Mr. Clark's Rule 26 Report, the contents of which Mr. Clark reaffirms in his  
2 sworn declaration, provide further qualifications. *Floyd v. Hefner*, 556 F.Supp.2d 617,  
3 635 (S.D. Tex. 2008). (Expert report attached to sworn declaration admissible).

4 Defendants cite to deposition testimony Mr. Clark has provided in other cases  
5 to disqualify his testimony here. As heretofore noted, the Ninth Circuit and other  
6 courts have cited Clark's testimony. Arguments that Mr. Clark has not published  
7 books or taught classes go to the weight not admissibility of his testimony. No  
8 requirement exists that this 27 year law enforcement veteran with significant  
9 supervisorial experience have also taught classes or authored books to qualify as an  
10 expert.

11 Defendants' argument that Mr. Clark's reading of *Graham v. Connor*, 490 U.S.  
12 386, 397 (1989) widely misses the mark. Clark testified that the standards governing  
13 the use of force enunciated in *Tennessee v. Garner* 471 U.S. 1, 11 (1985) and  
14 *Graham* were consistent with what he had learned since 1965. As he testified, "I've  
15 always felt that those cases were in the harmony of what I had always learned since  
16 1965." Ex. C to Fitzgerald Declaration at 18:23-25.

17 **B. Mr. Clark's Testimony Is Based On His Experience And The**  
18 **Evidence And Is Not Speculative.**

19 Defendants argue that Clark's testimony is speculative and should be stricken.  
20 Given Clark's experience as a police officer and supervisor involved in numerous  
21 apprehensions, he is qualified to state that had Deputy Patzer followed proper police  
22 procedures, Steffen Day would not have been killed. Given that Defendants'  
23 justification for the use of deadly force was the harm the deputy had sustained, it was  
24 not speculative for Clark to opine that he had not sustained such harm. Given  
25 Patzer's testimony that he shot Day after backing into the air conditioner, Clark did not  
26 speculate when he testified that the deputy was acting from a subjective, not  
27 reasonably objective fear of death or serious physical harm. As an experienced  
28 sheriff's department supervisor, Clark did not speculate when he ascribed Patzer's

1 behavior, in part, to a lack of sleep. Again, as an expert in police procedures, viewing  
2 the totality of circumstances, Clark was qualified to rely, in part, on the photographs of  
3 Deputy Patzer showing the injuries he had received, to conclude that Deputy Patzer  
4 used deadly force in response to a subjective fear and not objective factors. The  
5 totality of factors included evidence that the deputy had not sustained serious harm  
6 prior to the shooting.

7 Defendants' objection to Clark's testimony that Deputy Patzer would have been  
8 required to run by or into Deputy Patzer to flee through the gate is consistent with  
9 evidence in the Criminalistics report produced by Defendants; with the photographs of  
10 the scene Defendants have submitted and the testimony of Deputy Patzer provided at  
11 the administrative interview. Patzer testified that Day was coming at him in a  
12 southward direction and the Criminalistics report shows that the gate is to the south of  
13 the air conditioner. See, Ex. 5 to the Seaton Declaration, p. 773. The photographs  
14 show that Steffen Day's body was against the wall to the north of the air conditioner.  
15 Clark was not speculating when he stated that to reach the gate on that dark night,  
16 Steffen Day would have been force to run by or into Patzer to flee, disputing  
17 Defendants' repeated assertion that Day had the opportunity to flee with getting by  
18 Patzer.

19 Clark's testimony that his reading of the deputy's statement makes it appear  
20 that Deputy Patzer's unsupported belief that he was attacked by Day's confederates  
21 precipitated the deputy's use of deadly force is based on Patzer's own testimony and  
22 must be viewed as part of the totality of circumstances which led to the shooting. The  
23 lack of serious physical harm coupled with the deputy's baseless belief that he had  
24 been attacked from behind support Clark's opinion that the shooting was based solely  
25 on the deputy's subjective fear.

26 Clark's testimony about the source of Deputy Patzer's injuries is based on the  
27 record, not speculation. Defendants' summary judgment evidence shows the deputy  
28 going through the bushes and over a fence. No dispute exists that Patzer fell through

1 the gate, slipped in the garbage and put his hand through the debris; and, apart from  
2 what he stated was Day's initial punch to the head, only sustained glancing blows  
3 because he was able to duck and move. The expert also could rely on Sergeant  
4 Clark's testimony that Deputy Patzer told Sergeant Clark he had hit his head on the air  
5 conditioner.

6 **C. The Ultimate Issue Argument**

7 Roger Clark's opinions that Patzer committed a "fatal error" which was  
8 deliberately reckless and was directly connected to the shooting of Steffen Day do not  
9 tell the jury what result to reach. As an expert on police procedure, Clark was qualified  
10 to present the admissible opinion that Patzer acted recklessly in pursuing Day.

11 Even assuming that Clark may not venture an opinion about whether the  
12 shooting was objectively reasonable, he should be permitted to state that the shooting  
13 would not have been justified if Day had punched Patzer in the head.

14 Defendants' arguments under Federal Rule of Evidence 704, allowing opinions  
15 on ultimate issues, and run counter to the use of expert police procedure testimony  
16 recognized in *Scott v. Henrich, supra*, *Smith v. City of Hemet, supra*, and *Blankenhorn*  
17 *v. City of Orange, supra*. Defendants essentially ask the Court to rely solely on  
18 Deputy Patzer's self-serving testimony.

19 Even assuming Clark may not testify on the ultimate issue, (notwithstanding  
20 Federal Rule of Evidence 704), his declaration and report raise serious issues about  
21 Deputy Patzer's conduct. He states, for example, that:

22 Steffen Day was 17 years old. Deputy Patzer had no  
23 confirmed information that Steffen had committed any crime; carried  
24 any weapons or had ingested any drugs. Deputy Patzer had other  
25 non-lethal law enforcement tools, including a collapsible baton and  
26 pepper spray which could have subdued Steffen Day, but he made  
27 no attempt to use them. Most significantly, Steffen Day inflicted no  
28 serious physical harm or injury to Deputy Patzer and threatened no  
such injury.

1 Clark Deposition, ¶ 20.

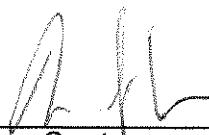
2 These admissible opinions would support a jury's finding that Deputy Patzer's  
3 use of deadly force was objectively reasonable.

4 **CONCLUSION**

5 The Court must overrule virtually all of Defendants' objections. The evidence  
6 Defendants' challenge, consisting largely of material located in the County's own  
7 records, is admissible evidence which raises material issues of fact. The Martin  
8 Declarations reflect their contemporaneous perception of events confirmed by  
9 subsequent investigation of the yard at 26 Galleon Way. Evidence that Deputy Patzer  
10 struck his head on the air conditioner was known to Defendants within days of the  
11 shooting and they may not be heard to complain about citation to the Sergeant Clark  
12 testimony or the declarations of the Martins who reported their conclusions to the  
13 authorities. Roger Clark has been qualified in numerous cases; his testimony is based  
14 on evidence, not speculation and, with the other evidence Defendants seek to  
15 exclude, raises questions which only a jury may resolve.

16 Respectfully submitted,

17  
18  
19 Dated: September 3, 2008

  
\_\_\_\_\_  
Thom Seaton  
**CASPER, MEADOWS, SCHWARTZ & COOK**  
Attorneys for Plaintiff

PROOF OF SERVICE

RE: **Shawn Day, et al. v. County of Contra Costa, et al.**  
**United States District Court Case No. C07-4335-PJH**

I am a citizen of the United States and am employed in the County of Contra Costa, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is 2121 North California Blvd., Suite 1020, Walnut Creek, CA 94596. On the date below, I served the following documents in the manner indicated on the below-named parties and/or counsel of record:

**PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTIONS TO EVIDENCE**


- ☐ **U.S. MAIL**, with First Class postage prepaid and deposited in sealed envelopes at Walnut Creek, California.
- ☐ **ELECTRONICALLY**, I caused said documents to be transmitted using ECF as specified by General Order No. 45 to the following parties.
- ☐ **FACSIMILE TRANSMISSION** from (925) 947-1131 during normal business hours, complete and without error on the date indicated below, as evidenced by the report issued by the transmitting facsimile machine.
- ☐ **Hand-Delivery Via Courier**
- ☒ **Other: OVERNIGHT DELIVERY.** On the date indicated below, I placed a true and correct copy of the aforementioned document(s) in a sealed envelope and/or package designated by **Federal Express Priority Overnight**, individually addressed to the parties indicated below, with fees fully prepaid, and caused each such envelope and/or package to be deposited for pick-up on the same day by an authorized representative of **Federal Express** at Walnut Creek, California, in the ordinary course of business.

**For Defendants**

James V. Fitzgerald, III  
McNamara, Dodge, Ney, Beatty, Slattery & Pfalzer LLP  
1211 Newell Avenue  
Walnut Creek, CA 94596  
Tel: (925) 939-5330  
Fax: (925) 939-0203

I declare under penalty of perjury under the laws of the State of California, and the United States of America, that the foregoing is true and correct and that I am readily familiar with this firm's practice for collection and processing of documents for mailing with the U.S. Postal Service.

Dated: September 3, 2008

  
SHANNON M. BOWERS